STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED, D/B/A AMERITECH INDIANA PURSUANT TO I.C. 8-1-2-61 FOR A THREE-PHASE PROCESS FOR COMMISSION REVIEW OF VARIOUS SUBMISSIONS OF AMERITECH INDIANA TO SHOW COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	}	**CAUSE NO. 41657**

AMERITECH INDIANA'S MOTION TO MODIFY ORDER ADOPTING PERFORMANCE ASSURANCE AND REMEDY PLAN BY STAYING ITS IMPLEMENTATION PENDING JUDICIAL REVIEW

Pursuant to IND. CODE § 8-1-2-72, 170 IAC 1-1.1-12 & -26(a), and IND. TRIAL RULE 62, Indiana Bell Telephone Company, Incorporated ("Ameritech Indiana") moves the Indiana Utility Regulatory Commission ("IURC" or "Commission") to modify its October 16, 2002 Order on Performance Assurance Plan in this cause ("Order") by staying the Order pending judicial review (including Ameritech Indiana's appeal to the Court of Appeals of Indiana).

Background And Introduction

This proceeding arises from Ameritech Indiana's planned application to the Federal Communications Commission ("FCC"), under § 271 of the Federal Telecommunications Act of 1996 ("Act"), to provide interLATA telecommunications services (in everyday parlance, "long distance" services) originating in Indiana ("§ 271 Application"). The proceeding's purpose is the nonbinding recommendation that the Act contemplates the IURC's making to the FCC on that § 271 Application. The Order is made effective on adoption, and directs Ameritech Indiana to implement an SBC Ameritech Indiana Performance Assurance and Remedy Plan ("IURC

Remedy Plan" or "IURC Plan"). That Plan (a) imposes detailed performance testing, reporting and auditing requirements on Ameritech Indiana as to its obligations to competing local exchange carriers ("CLECs") under § 251 of the Act; and (b) requires Ameritech Indiana to make monetary payments ("Payments") to CLECs and the State if performance of § 251 obligations does not meet the Plan's statistically and mathematically determined compliance standards for many of the Plan's various "performance measures."

As shown in Ameritech Indiana's November 6, 2002 Petition for Reconsideration ("Recon. Pet.") and November 25 Reply in Support thereof ("Recon. Reply"), the Commission lacks statutory authority to enter the Order under Federal or State law, and the Order unlawfully circumvents and is preempted by the "interconnection agreement" procedures established by § 252 of the Federal Act. As documented in the initial and supplemental affidavits of James D. Ehr submitted with the Reconsideration Petition and Reply, respectively ("Initial Ehr Aff." and "Supp. Ehr Aff."), the Order also (a) imposes substantial implementation and compliance costs on Ameritech Indiana totaling in the millions; and (b) would require Payments to CLECs and the State that constitute penalties, and far exceed the Payment provisions to which Ameritech Indiana was voluntarily willing to agree in connection with its § 271 Application.[1]

Ameritech Indiana therefore urged the Commission to reconsider and vacate the Order, and asked (in its Petition to Modify filed with the Reconsideration Petition) that the Commission delay the Order's effective date pending reconsideration. Ameritech Indiana reiterates its sincere hope that the Commission will indeed so delay the Order's effective date and then grant the relief

[1] Ameritech Indiana incorporates in the instant Stay Motion the Reconsideration Petition, the Reconsideration Reply, the Initial Ehr Affidavit and the Supplemental Ehr Affidavit.

sought by the Reconsideration Petition. This will effectively moot the need for judicial review proceedings and the substantial time and expense for the IURC and its counsel, as well as Ameritech Indiana, that such proceedings will necessarily entail. Due to the Order's serious legal flaws and substantial costs and penalty Payment provisions, however, Ameritech Indiana has in the interim preserved its rights to judicial review. On November 14, 2002, it filed an action seeking declaratory and other relief based on the preemption and other Federal law errors in this IURC proceeding under the Federal Act. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, Case No. 1:02-CV-1772-LJM (S.D. Ind.) ("Federal Review Action"). As to the State law also violated by the Order, Ameritech Indiana preserved its judicial review rights *via* its later Notice of Appeal to the Court of Appeals of Indiana. Cause No. 93A02-0211-EX-950 (Ind. Ct. App.) ("State Court Appeal").

The instant Motion to stay the Order pending judicial review ("Stay Motion"), which is being filed in light of those judicial review proceedings, will also be mooted by the IURC's granting the relief sought on reconsideration. If the Commission denies that relief, however, it should at the same time grant this Stay Motion. As shown below, the standards for a stay pending appeal – which include the serious legal issues on the Order's validity and the harm it imposes on Ameritech Indiana – are more than satisfied here.[2]

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[2]The IURC presumably has power to stay its orders pending appeal under IND. CODE § 8-1-2-72, authorizing it to amend, alter or rescind its orders. *Northern Ind. Pub. Serv. Co. v. Citizens Action Coalition of Indiana, Inc.*, 548 N.E. 2d 153 (Ind. 1989), held this section did not give the IURC power to stay pending *further* appeal an order made to comply with an appellate remand on a *prior* appeal; but that holding was grounded in the "prior remand" context (and specifically, ensuring that the IURC comply with appellate remand directions). *See* 548 N.E.2d at 162-63. Outside that context, there is no evident reason the IURC's IND. CODE § 8-1-2-72 authority to amend, alter or rescind its orders would not include power to stay an order pending appeal; but Ameritech Indiana counsel are unaware of any reported decision squarely so holding.

Standards For Granting A Stay Pending Judicial Review

The factors that should guide the Commission's stay consideration are the same factors a court considers in reviewing denial of a stay. These are (1) the movant's likelihood of success on judicial review; (2) the harm to the movant if a stay is not granted, and the balance of harms between the movant and those opposing a stay; and (3) the public interest. *See* GEORGE R. PATTON, APPELLATE PROCEDURE 165 (3rd ed. 2001).

These factors parallel in part, but plainly are not identical to, the familiar preliminary injunction prerequisites. Most important, in the stay context there is clearly no requirement that harm to an appellant be "irreparable" in the sense that it is not monetarily compensable. In the context of the different and "extraordinary relief" of a preliminary injunction, it "is well-settled that a party which suffers 'mere economic injury' is not entitled to injunctive relief . . . ." *Indiana Port Comm'n v. Consolidated Grain and Barge Co.*, 701 N.E.2d 882, 886-87 (Ind. Ct. App. 1998). By contrast, a stay pending appeal of a judgment ordering the payment of money is not "extraordinary," but rather is automatic and a matter of right upon posting of approved security. *See* T.R. 62(D). Hence, "economic injury" – which does not count for preliminary injunction purposes – is obviously very pertinent for stay purposes.

This demonstrates two key points for purposes of the Stay Motion here. First, the substantial implementation and compliance costs the Order imposes on Ameritech Indiana are a proper and important factor in the stay calculus. As shown below, this and the other stay factors warrant a stay of the Order in its entirety pending judicial review. Second, even if the Order were not stayed *in toto*, Ameritech Indiana would be entitled on providing appropriate security to

stay of the Payment provisions of the IURC Plan – which indisputably would compel "payment of money" to CLECs and the State. This contingency will of course not arise if the Order is (as it should be) stayed altogether. Also, the Payment amounts would be contingent on future events under the IURC Plan, which would complicate determining the proper amount and form of security. For these reasons, Ameritech Indiana will submit any proposed security arrangements for a stay solely of the Payment provisions only if and when it becomes pertinent to do so.

Grounds For Stay Of The Order Pending Judicial Review

I. Ameritech Indiana Has Demonstrated, At The Minimum, A Substantial Likelihood Of Success On Judicial Review.

As shown in the Reconsideration Petition and Reply, the Commission had no authority under the Federal Act to compel Ameritech Indiana to implement the IURC Remedy Plan in this § 271 proceeding; the IURC Plan conflicts with and is preempted by the Act's interconnection agreement procedures; and the Order also exceeded the Commission's authority under State law. At the minimum, Ameritech Indiana has demonstrated a substantial likelihood of success on judicial review of these legal issues. To briefly reiterate, the key points are these:

(1) § 271 Confers No Authority To Order A Remedy Plan With Which The Applicant Does Not Agree – A remedy plan in the context of a § 271 Application by a former Bell Operating Company can provide assurance on ongoing BOC compliance with § 251 obligations for purposes of a State commission recommendation and the FCC decision on that Application. That is why BOCs have proposed such plans, State commissions have approved them, and the FCC has credited them in deciding § 271 Applications. In effect, a § 271 applicant proposing a remedy plan with Payment provisions is agreeing to (a) have its future compliance

with § 251 obligations measured in certain ways, and (b) make Payments to CLECs and the State when its compliance (as so measured) falls short – with both agreements being made to provide post-long distance authority assurance to the State commission and the FCC on the § 251 aspects of their recommendation and decision, respectively, on the § 271 Application.

But nothing in § 271 authorizes a State commission or the FCC to order payment of damages or penalties to CLECs or a State for a long distance applicant's noncompliance with § 251 obligations *when the BOC has not agreed to do so*. Nor has the FCC asserted that such authority exists (for State commissions or itself) in pertinent § 271 proceedings. Rather, such proceedings have involved remedy plans agreed to by the BOC as part of its § 271 Application, typically plans proposed by the BOC which may then have been modified during State commission or FCC consideration in ways the BOC was willing to accept. But none of these FCC proceedings involved a State commission or the FCC *requiring* the BOC to implement a remedy plan with provisions a BOC was *not* willing to accept as part of its § 271 Application.

That remedy plans acceptable to BOCs are found in State commission and FCC "orders" on § 271 Applications does not mean either agency may "order" remedy plans with provisions *not* acceptable to BOCs. Authority to approve what a party has agreed to do neither implies nor creates authority to compel the party to do what it has not agreed to do. This is shown, *e.g.*, by judicial consent decrees; by FCC approval of SBC-Ameritech merger conditions it had no power to order absent the merging parties' agreement; and by this Commission's approval of Opportunity Indiana 2000 settlement provisions it had no power to order absent the settling parties' agreement. *See* Recon. Reply at 13-14 & n.5.

(2) Remedy Plans In Any Event Take Effect *After* Approval Of A § 271 Application, Not During The Application Process – The Order also improperly directs Ameritech Indiana to implement the IURC Plan *now*, in advance of FCC approval of its § 271 Application. Pertinent FCC orders make clear that the very purpose of remedy plans is to create incentive for ongoing compliance with § 271 obligations (including § 251 obligations to CLECs) *after* granting BOC long distance authority. Indeed, CLEC efforts to require implementation of a remedy plan prior to such FCC approval have been rejected precisely because FCC orders consistently state that the plan's purpose is ensuring BOC compliance with such obligations *after* entry into the long distance market. *See* Recon. Reply at 15-16 & nn.6-7.

(3) The Order Circumvents And Is Preempted By The Interconnection Agreement Procedures Of § 252 Of The Federal Act – The IURC Remedy Plan is explicitly made "available to CLECs as a stand-alone document, independent of the Section 251/252 interconnection agreement process." IURC Plan § 2.1 at 6. This circumvents the negotiation and other carefully detailed interconnection agreement procedures of § 252 of the Act, adopted by Congress in its deliberate choice of a contractual, deregulatory framework for such agreements. United States Supreme Court authority establishes that State action undermining the *methods* Congress selects to implement a Federal statute is preempted. Applying these principles, several decisions have specifically held that State commission actions evading § 252's interconnection agreement procedures are preempted. This is an independent reason that the Order directing implementation of the IURC Plan here violates Federal law. *See* Recon. Pet. at 18-22; Recon. Reply at 17-19.

(4) The IURC Plan's Payment Provisions Also Exceed The Commission's State Law Authority, Which Confers No Power To Award Money Damages Or Impose Civil Penalties – The Commission has no powers beyond those specifically granted it by the General Assembly. Indiana law is clear that the Commission has no statutory authority to order payment of money damages. Here, the IURC Remedy Plan imposes duties on Ameritech Indiana, and establishes and mandates money Payments Ameritech Indiana must make to CLECs and the State for future breaches of such duties. Thus, the Order prospectively (and automatically) requires Ameritech Indiana to make Payments – based on possible future failures to meet the IURC Plan's performance standards – that the Commission would have no statutory power to order even *after* any such future failure allegedly took place, and was found following an IURC investigation to have occurred in fact. No Indiana statute grants the Commission such authority, either directly or as an exercise of any rulemaking power (which this § 271 Application proceeding did not even involve.) The lack of such authority is all the more evident since the IURC Plan's required Payments are not based upon the existence or amount of any harm to any of the entities to which the Payments must be made. Those Payments instead constitute "penalties," which the Commission has no power either to award to private parties or to assess on behalf of the State. Indeed, the Payment penalties here would not even be enforceable as liquidated damages provisions agreed to by private contracting parties. *See* Recon. Pet. at 12-18.

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Ameritech Indiana thus has substantial likelihood of success on the controlling Federal law issues in the Federal Review Action, and on the additional State law issues in the State Court Appeal. This factor for issuing a stay pending judicial review is more than satisfied.

II. The Order's Harm To Ameritech Indiana, And The Lack Of Legally Cognizable Harm To CLECs Or The State From Issuing A Stay, Also Warrant Staying The Order's Implementation Pending Judicial Review.

Ameritech Indiana has presented sworn evidence of the substantial implementation and compliance costs, totaling in the millions, that the Order imposes on it (even aside from the Payment provisions). *See* Initial Ehr Aff. at ¶¶ 4-8. It has reinforced that documentation with sworn evidence refuting the attempt by some Indiana CLECs (based largely on assertions of opinions and legal conclusions) to pretend that harm does not exist. *See* Supp. Ehr Aff. at ¶¶ 3-10. Objective examination of the evidence on this stay factor leaves no doubt that the Order imposes millions of dollars in costs on Ameritech Indiana.

This significant harm is a compelling factor in the stay calculus regardless whether such costs would ultimately be recoverable by Ameritech Indiana in whole or in part. As shown, a stay pending appeal (unlike a preliminary injunction) does not require that harm be "irreparable" in the sense that it is not monetarily compensable. Moreover, to the extent any part of the costs imposed by the Order would not be recoverable by Ameritech Indiana, then the harm to it absent a stay would indeed be "irreparable" even in the preliminary injunction sense. Conversely, to the extent any part of such costs would ultimately be borne by utility customers, then the harm absent a stay would adversely affect the public – which is a separate factor warranting a stay.

The "harm" factor's companion consideration – the balance between harm to Ameritech Indiana and any harm a stay might cause other parties – also clearly favors a stay. Stay of the Order pending judicial review will in fact cause no legally cognizable harm to Indiana CLECs or the State. This is apparent for at least three reasons.

First, a stay will *not* alter or eliminate Ameritech Indiana's obligations to CLECs under § 251 of the Federal Act. Those obligations and any remedies for their violation are established by the Act itself. They exist independently of § 271, and regardless of whether Ameritech Indiana files or pursues a § 271 Application for long distance authority (something it is neither "required" nor may be "compelled" to do at all). A stay of the Order pending judicial review will not affect in the least those statutory § 251 obligations and CLEC remedies (or any interest the State may claim to have therein).

Second, neither CLECs nor the State will suffer any legally cognizable harm from staying the Order's imposing of additional, non-statutory remedies (including the IURC Plan's Payment provisions) involving Ameritech Indiana's compliance with § 251 obligations. Evaluation of such compliance in the context of a § 271 Application is pertinent to whether Ameritech Indiana should succeed on *its* effort to obtain long distance authority. But CLECs have no "right" to any Payments or other non-statutory remedies involving § 251 obligations that Ameritech Indiana may be willing to accept for purposes of its own long distance effort – much less to any such remedies it is *not* willing to accept – any more than they have any "right" to compel Ameritech Indiana file or pursue a § 271 Application in the first place. Again, the same points are true as to any interest the State may claim. CLECs and the State would be no more "harmed" by a stay of the Order in this § 271 proceeding than they would be by an Ameritech Indiana decision no longer to pursue long distance authority – which it has an absolute right to do, and would effectively terminate this § 271 proceeding.

Third, staying the Order pending judicial review will in fact not even deprive CLECs of the availability of additional, non-statutory remedies involving Ameritech Indiana's § 251 obligations. Remedy plan provisions substantially identical to those Ameritech Indiana offered as a compromise in this § 271 proceeding (including Payment provisions) are now included in an amendment to an Ameritech Indiana interconnection agreement with an Indiana CLEC (Time-Warner Telecom) that was voluntarily negotiated pursuant to § 252 of the Act. That amendment has been filed with the Commission, and (once it is approved) these remedy plan provisions will, under the Act, be available to any other Indiana CLEC. *See* Recon. Pet. at 3.

III. A Stay Pending Judicial Review Will Not Harm The Public Interest.

As to the final stay factor, the absence of any legally cognizable harm to the State from staying the Order also shows that a stay will not harm the public interest.

This conclusion is not altered by claiming the IURC Plan's extra-statutory Payment and other "incentives" for compliance with § 251 obligations furthers the "competitive" or other "public interest" purposes of the Act. The actual "public interest" purposes of the Act, and the legally permissible means by which its competitive and other purposes may be advanced, are established by the Act itself. The Act imposes no Payment "incentives" for compliance with § 251 obligations. Nor (as shown) does it authorize a State commission or the FCC to do so in a § 271 proceeding (a) absent the BOC's willingness to agree to such incentives as part of its own effort to enter the long distance market, or (b) before that entry has been approved.

Finally, to the extent all or part of the millions in costs that the Order imposes on Ameritech Indiana may ultimately be borne by utility customers, failure to stay the Order pending judicial review will affirmatively disserve the public interest. This, too, warrants a stay.

The Circumstances Here Demonstrate That No Bond Or Other Security Is Required Or Appropriate For Stay Of The Order Pending Judicial Review

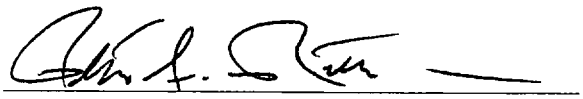
Even in the context of money judgments, posting a bond or other security is not a *requirement* for a stay pending appeal. This is shown, *e.g.*, by Seventh Circuit cases applying Federal stay rules analogous to those of T.R. 62. *See Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986) (district court properly required no bond to stay $181,000,000 judgment when appellant was "public utility" and "in no financial jeopardy"). The same is obviously true of Ameritech Indiana.

Requiring any bond or other security to stay the Order here is particularly unnecessary and inappropriate. As shown, CLECs have no entitlement to imposition in a § 271 proceeding of extra-statutory remedies on § 251 compliance, which may be "ordered" only if a BOC is willing to accept them as part of its own long distance application. Hence, CLECs are equally not entitled to any "security" for stay of those extra-statutory remedies pending judicial review of an Order seeking to impose them. This is especially evident because (as also shown) even remedy plans a BOC *is* willing to accept as part of its § 271 Application do not go into effect until *after* long distance authority is approved by the FCC. Since implementation of a § 271 remedy plan must in any event await approval of the § 271 Application, there is plainly no valid basis to require "security" to stay pre-approval implementation in the midst of the § 271 proceeding.

Conclusion

For the reasons shown in the Reconsideration Petition and Reply, the Commission should vacate the Order and grant the other relief requested on reconsideration. If, however, the Commission denies such relief, then it should at the same time stay the Order pending judicial review, for the reasons shown in this Stay Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2002 I caused a true and correct copy of the foregoing Stay Motion to be served to Ameritech271@urc.state.in.us.

Peter J. Rusthoven [# 6247-98]